Supreme Court, U.S.
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No. 01-1222

IN THE

Supreme Court of the United States

DENISE SMITH,

Petitioner,

v.

TALLAHASSEE DEMOCRAT and BILL COTTERELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE AND FACTS

Petitioner, Denise Smith ("Smith") through her Petition for Writ of Certiorari seeks review of an order dismissing with prejudice a complaint (the "Complaint") filed by her in Leon County, Florida. Specifically, the Order at issue (A1),[1] dismissed all of the counts of Smith's Complaint against the Respondents, Tallahassee Democrat and Bill Cotterell (hereafter collectively, the "Democrat") with prejudice. The Democrat affirmatively disputes Smith's inaccurate statement of the operative facts. The correct operative facts are as follows:

On April 13, 2000, Smith filed a five-count complaint against numerous individuals and entities. These Defendants, included the State of Florida, the Honorable Jeb Bush as Governor of the State of Florida, the Tallahassee Democrat and one of its reporters, Bill Cotterell, among others. Smith's Complaint was approximately twenty eight pages single spaced, and totaled almost one-hundred and thirty pages with its exhibits.

Smith's Complaint against some of the other Defendants is still pending in the trial court, though at least one other Defendant, Wendy Searcy, has also been dismissed. Smith has appealed dismissal of Wendy Search to the First District Court of Appeal for the State of Florida. Thus, Smith's Complaint remains pending in the trial court against the remaining Defendants.

In her complaint, Smith alleged three counts against the Democrat: Count II "Media Libel", Count III "Conspiracy to

1. The Democrat is not filing supplemental materials. Therefore, citations to the appendix refer to the materials in Smith's Appendix.

Libel", and Count V "Harassment and Intentional Causing of Emotional Distress." The sole basis for Smith's Complaint against the Democrat is a column published by the Democrat on August 31, 1998 (A7-the Column).

Accepting the allegations of Smith's Complaint as true, the substance of Smith's Complaint centers on a dispute between Smith and another employee of the Florida State Hospital, Larry Kranert. According to Smith's Complaint, Mr. Kranert filed a grievance concerning Smith's management style shortly after being transferred under Smith's supervision. This grievance appears to have started a war of correspondence between Smith, Kranert, and numerous state officials. On August 31, 1998, Bill Cotterell, a reporter for the Democrat, wrote a column entitled, "By whatever job title he has now, he is in trouble" ("Column"). The Column discussed a lawsuit that Mr. Kranert had filed against the Florida Department of Children and Families and seven state officials, including Smith. This Column forms the sole basis for Smith's Complaint against the Democrat. It is reproduced, in its entirety, as it appeared on August 31, 1998 (over twenty months before the Complaint was filed) immediately following this section. Smith is never mentioned in the Column.

On May 15, 2000, the Democrat filed a Motion to Dismiss Smith's Complaint. On August 9, 2000, the Honorable Nikki Clark, Leon County Circuit Court Judge, heard argument from both Smith and the Democrat on the Democrat's Motion to Dismiss. On September 11, 2000, Judge Clark issued an Order dismissing Smith's Complaint against the Democrat with prejudice (the "Order").

On July 3, 2001, the First District Court of Appeal for the State of Florida Per Curiam affirmed the trial court's decision to dismiss the Complaint against the Democrat with prejudice. The Florida Supreme Court refused to review the First District Court of Appeal's Per Curiam Decision. Thereafter, Smith filed the current Petition for Writ of Certiorari ("Petition") which was docketed with this Court on February 25, 2002.

TALLAHASSEE DEMOCRAT
MONDAY, AUGUST 31, 1998
THE COLUMN

BY WHATEVER JOB TITLE HE HAS NOW, HE IS IN TROUBLE

A lot of people in state government feel overqualified, and state employees often say they've been shelved in a dead-end job for speaking out against managers who want them to quit.

Then there's Larry Kranert, the lawyer, the accountant. Larry Kranert, the stock boy and typist. Larry Kranert, the fired guy now suing the Department of Children and Families.

Even in the stilted language of the law, his experience reads like a Gothic horror story.

Riding the job-go-round

Kranert was hired in 1992 as the chief lawyer for Florida State Hospital, in the old Department of Health and Rehabilitative Services.

Shortly after former HRS Secretary Bob Williams took over as administrator of the hospital, Kranert was demoted to assistant counsel – he said, "without notice or explanation." Last year, he was told that his Selected Exempt Service legal job was being deleted in a belt-tightening move.

Last September, he moved to a job as an accountant – he has a degree in accounting too – with an understanding this his salary would stay $2,027 bi-weekly for five years.

The Accountant IV job was in Career Service, and the move was made without advertising the position. But DCF assured him that was all right.

He cleared his six-month probation period in April.

In May, he filed a grievance over what he considered improper practices in the finance office. Soon after the governor's office inquired about his complaint, Kranert was told that he had created "problems in the workplace," so it would be better if he worked at "an un-air-conditioned storehouse" at the Materials Management Division of Florida State Hospital.

There, the man with degrees in law and accounting counted linens, paint cans and bed pans. His lawsuit also says "he has labored as a clerk, stock boy and typist."

Fired without any warning

On June 15, Kranert was notified that his salary was being cut to $1,681 biweekly (still pretty high for an inventory clerk). He was given until Aug. 1 to find another job.

That's because – surprise! – DCF and the Department of Management Services have determined that his Career Services hiring was improper, since the accounting vacancy hadn't been advertised, etc.

Well, says Kranert, that's what he tried to tell them when they moved him. He says DCF assured him it was all "permissible and within agency rules."

Williams declined comment, saying "it's not appropriate to try litigation in the paper." But he did say "there's not one scintilla of truth about any retaliation" against Kranert for his complaint about financial practices at Florida State Hospital.

But even with the most innocent of motives, there's a warning here for other Senior Management and Select Exempt Service employees.

They can be fired without warning, reason or recourse – which is why some are looking for shelter in Career Services before a new administration takes over. Those who transfer downward ought to know that, if management messed up the paperwork, they're the ones who'll suffer for it.

SUMMARY OF THE ARGUMENT

This Court should deny Smith's Petition. Smith's Complaint was correctly dismissed by the Florida trial court and full appellate review has occurred in the First District Court of Appeal and the Supreme Court of Florida. This pro se litigant and her meritless claims have had their day in court. Smith has dragged the Democrat through the entire judicial system of Florida, forcing it to expend time

and resources defending itself against her frivolous claims. The courts of Florida decided the issues correctly based upon both Federal and State law. The decision Smith complains about has independent state grounds to support it. Consequently, this Court should decline to invoke its jurisdiction in this matter.

Additionally, the case does not involve unsettled matters of law, nor does it involve matters of great injustice. Instead, this case evidences the abuse of the judicial system by an overzealous pro se litigant. Smith has made the Democrat a hostage in her own personal vendetta against another Defendant, Mr. Kranert. In short, Smith's frivolous claims are unworthy of this Court's attention.

In recognition of the importance of freedom of the press and the chilling effect libel actions have on the press, the well established case law in Florida clearly mandates pretrial disposition of meritless libel actions. As Smith's Complaint against the Democrat was completely devoid of merit, the trial court properly dismissed Smith Complaint against the Democrat with prejudice.

The trial court stated four independent reasons for dismissing Count II of Smith's Complaint (Media Libel). (A1-Order at issue) All four of the reasons relied upon by the trial court were correct. First and foremost, the trial court correctly held the Column did not libel Smith. The Column was not false, nor did it damage Smith's reputation. Any reasonable reading of the Column leads one to this inescapable conclusion.

Second, the trial court correctly concluded that the Column was not of and concerning Smith. Therefore, the

Column could not form the basis of a libel action by Smith. The Column discusses the Florida State Hospital, identifying and quoting its administrator Bob Williams. The Column does not mention Smith by name or title. Libel is a personal action. Smith may not maintain a libel action for statements regarding the Florida State Hospital generally.

Third, the trial court correctly held that accepting the allegations of Smith's Complaint as true, Smith is a public official. As a public official, Smith must prove actual malice on the part of the Democrat by clear and convincing evidence. Actual malice is defined as publication of a false statement with knowledge of its falsity, or with reckless disregard for its falsity. As the Column is a substantially accurate report of a lawsuit filed against the State of Florida, the trial court correctly held that Smith could not clearly and convincingly prove actual malice and properly dismissed the Complaint. Finally, the trial court found the Fair Reporting Privilege to be applicable. Florida law recognizes the Fair Reporting Privilege, which protects substantially accurate reports of official judicial proceedings. The Column expressly states that it is based upon a lawsuit filed against the State of Florida, and accurately reports the allegations of the lawsuit. Consequently, it is protected speech and cannot form the basis of a libel action by Smith against the Democrat.

Smith's remaining counts were also properly dismissed. Smith cannot state a cause of action for conspiracy to libel when there has been no libel. Under Florida law, Smith also may not transform a libel action into an intentional infliction of emotional distress action absent an independent tort. There was no independent tort. Therefore, the intentional infliction of emotional distress count was also properly dismissed. In conclusion, the trial court properly decided this case.

ARGUMENT

I. SMITH'S PETITION SHOULD BE DENIED.

Smith asks this Court to review a Florida trial court's decision. While Smith attempts to argue Federal questions are involved and thereby this Court's jurisdiction is justified, a review of the Order in question reveals otherwise. As stated previously, the Order listed four independent reasons for dismissing Smith's libel claim. Three of those four reasons for the trial court's decision were based upon independent state grounds, including the primary and most important reason – the article did not libel Smith as a matter of law.[2] As the trial court's decision has independent state grounds, this Court should deny Smith's Petition.

A. Independent State Grounds.

This Court has addressed its own jurisdiction to review state court decisions when the decision rests on independent state grounds on numerous occasions. *See Enterprises Irrigation District v. Farmer Mutual Canal Company*, 243 U.S. 157, 164 (1917) (numerous citations within); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (numerous citations within). In each of these cases, this Court has found that it lacked jurisdiction to review the state court decision.

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2. The one ground cited by the trial court which may arguably involve questions of Federal law: the applicability of the actual malice standard established in *New York Times v. Sullivan*, 376 U.S. 254, 279-81 (1969), has been sufficiently discussed by this Court in other opinions. *See Masson v. New York Magazine*, 501 U.S. 496 (1991); *Harte-Hanks Communications, Inc.*, 491 U.S. 657 (1989); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Herbert v. Lando*, 441 U.S. 153 (1979). Thus, this issue does not warrant granting Smith's Petition.

In the present case, the trial court found that the Column did not libel Smith as a matter of Florida law. This Court should not review this decision, as it was properly based upon Florida law. Additionally, the trial court's determination that the Column was not "of and concerning" Smith was based upon state court decisions applying the Florida standard. Finally, the trial court found that the Column was protected by a privilege recognized by Florida law, the Fair Reporting Privilege. Again, this Court should not review this decision, as it is a matter of state law. Therefore, the trial court's decision had multiple independent state grounds, which should preclude further review by this Court.

B. Problems within Petition.

Smith's Petition is defective on several grounds. First, Smith fails to provide this Court with the key documents necessary for it to decide whether to grant certiorari. However, Smith does include in her Appendix and Petition materials and information from outside the record, which should not properly be considered by this Court. Finally, Smith misstates both the facts and the law of this case.

Initially, Smith has filed to provide this Court with the key documents necessary to review this action. Without Smith's Complaint, the Democrat's Motion to Dismiss, and Smith's response, this Court cannot adequately evaluate this case. If the proper documents had been provided, this Court could better appreciate the lack of merit and the absurdity of Smith's claims against the Democrat. Absent these key documents, this Court should still have no problem recognizing that the trial court was correct; but it may not be able to fully appreciate the zeal with which she has pursued these meritless claims against the Democrat.

In her Petition, Smith has spent considerable time making new allegations against the Democrat concerning conduct that occurred subsequent to the filing of her Complaint and even subsequent to the trial court's Order. Examples can be found in paragraphs 16, 44, 48, and 65 of Smith's Petition but references are sprinkled throughout. Furthermore, Smith has attached several items to her Appendix that were *not* part of the record with the trial court. Smith's Petition, Apps. A12-A18. These items should be disregarded by this Court.

Florida law prohibits an appellate court from considering evidence or allegations that were not presented to the lower tribunal. *See Hillsborough County Board of County Commissioners v. Public Employees Relations Commission*, 424 So. 2d 132, 134 (Fla. 1st DCA 1982); *Seashole v. F & H of Jacksonville, Inc.*, 258 So. 2d 316, 317 (Fla. 1st DCA 1972). "It is axiomatic that appellate review is confined to the record on appeal. . . . It is inappropriate and will subject movant to sanctions to inject matters into the appellate proceedings which were not before the trial court." *Thorner v. City of Fort Walton Beach*, 534 So. 2d 754, 755 (Fla. 1st DCA 1988). Additionally, this Court's review is limited to the record presented below. *See Witters v. Washington Dept. of Services for Blind*, 474 U.S. 481, 486 n.3 (1986).[3]

The Democrat hereby respectfully requests that this Court disregard Smith's improper new arguments and allegations.

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3. In the same vein, the Democrat will not respond to Smith's assertions of inability to obtain counsel, and trust this Court will recognize that any difficulty Smith may have encountered locating counsel is more a reflection of the complete lack of merit of her case than any conspiracy among attorneys in Florida.

The Democrat relies upon the cited case law and the unquestionable principle of law that issues can not be raised for the first time on appeal. Clearly, allegations regarding subsequent conduct or events are not properly before this Court and should be disregarded.

In paragraph 60 of her Petition, Smith states that Court decided all issues of fact. This is not correct. The trial court properly applied the correct legal standard on a motion to dismiss and accepted all of Smith's allegations as true. Even accepting her allegations as true, the trial court concluded that Smith could not state a cause of action for libel against the Democrat based upon the Column. Throughout her Petition, Smith asserts the Column contained numerous false statements. *See* Paragraph 25 of Petition. However, there is only a single inaccurate statement – the Column stated Mr. Kranert had a degree in accounting and he does not. Clearly, this minor inaccuracy did not concern or libel Smith. Even assuming the other items cited by Smith were false (they were not), Smith was still not libeled by the Column. These are representative examples of Smith's habit of misstating both the facts and the law.

II. THE COLUMN DID NOT LIBEL SMITH.

The Order dismissing Smith's Complaint stated four independent reasons for dismissing Count II ("Media Libel"): 1) the Column did not libel Smith; 2) the Column was not "of and concerning" Smith; 3) as a public official Smith would be required to prove actual malice, which she can not do; and 4) the Column is protected by the Fair Reporting Privilege. (A1) Count III ("Conspiracy to Libel") was dismissed by the trial court on the basis that there can be no conspiracy to libel when there has been no libel. Finally,

Count V ("Harassment and Intentional Causing of Emotional Distress") was dismissed on the basis that an action grounded in libel may not be transformed into an action for intentional infliction of emotional distress absent an independent tort; and there was no independent tort in this action.

A. The Column is Not Libelous.

The threshold question addressed by the trial court was whether the complained of statements in the Column were libelous. Florida law provides that libel is a false written statement that injures the reputation of another. *See Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 804 (Fla. 1st DCA 1997). The initial determination of whether a particular statement is libelous is a question of law for the court to decide. *See Ross v. Gore*, 48 So. 2d 412, 416 (Fla. 1950) ("When the statement alleged to be libelous could not properly leave the impression charged in the innuendo, there is no issue for the jury."). The court should consider the alleged libelous statement as the common mind would understand it, not by the extremes. *See Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. 4th DCA 1983). With all due respect to Smith, a review of her Complaint and the arguments made in her Petition reveal that she routinely argues extreme and unreasonable interpretations of the facts and the law.

The Column at issue was not false, as it accurately reported the allegations of the lawsuit filed by Kranert (a copy of which was attached to Smith's Complaint as Exhibit Y). In addition, the Column does not damage Smith's reputation. Smith is never mentioned by name, or title. Smith is not accused of any wrong doing, nor is she implicated in any improper activity. The Column is simply not about Smith.

Despite Smith's hyper-imaginative interpretations to the contrary, the story simply does not concern her, and consequently could not have damaged her reputation. No reasonable reader could conclude that the story defamed Smith. As the trial court properly decided that the alleged communication could not possibly have a defamatory or harmful effect, the court properly disposed of the claim through dismissal. *See Byrd v. Hustler Magazine, Inc.*, 433 So. 2d at 595.

B. The Column is not "of and concerning" Smith.

Libel is a personal action. It is fundamental that in order to recover in a libel action the plaintiff must show that the statements are of and concerning her. *See Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800 at 805 (affirming dismissal with prejudice on this basis). Allegations of libel by an organization and its members are not interchangeable; statements that refer to an organization do not implicate its members or officers. *See McIver v. Tallahassee Democrat, Inc.*, 489 So. 2d 793, 794 (Fla. 1st DCA 1986) (statement that company's president testified before grand jury involving bribery could not support libel action by company as a matter of law.) To allow a government official to bring a libel action based upon statements concerning their particular governmental entity would "invite the specter of prosecutions for libel on the government, which the Constitution does not tolerate in any form." *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966).

The Column that was the subject of the action below clearly did not meet the required element in Florida law that the allegedly libelous statements be "of and concerning" Smith. Smith was never mentioned in the Column by name

or title. In fact the Column names only one individual other than Kranert, the hospital administrator, Bob Williams. The gist and tenor of the Column is directed toward the Florida Department of Children and Families (the "DCF") as an entity, not any one individual.[4] A generic reference to "managers" does not justify the conclusion that the Column is about Smith. In her Petition (pg. 23), Smith attempts to insert her name in numerous places in the Column. The fact is that her name does not appear anywhere. Her insertions are again an exaggerated attempt to create references to herself where none reasonably could be construed to exist. As the Column is directed at DCF and the Florida State Hospital, the trial court correctly ruled that Smith cannot state a claim for libel against the Democrat.

C. The Column concerns public officials and is therefore protected speech.

In the landmark case of *New York Times Co. v. Sullivan*, 376 U.S. at 279-81, this Court held that a public official may not recover damages for defamatory statements unless she can prove the statements were made with actual malice. This Court defined actual malice to be publication with knowledge of falsity, or with reckless disregard of whether it was false or not. *See id.* The plaintiff must demonstrate actual malice with clear and convincing evidence. *See id.* at 282; *Cronley v. Pensacola News-Journal, Inc.*, 561 So. 2d 402, 405 (Fla. 1st DCA 1990) (affirming summary judgment against the plaintiff for failure to meet this high burden).

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4. Smith may not prosecute a libel action based upon statements concerning the DCF or the Florida State Hospital. Such an action is constitutionally prohibited. *See Rosenblatt*, 383 U.S. at 81.

Florida law provides that a public official is an individual among the hierarchy of government employees who has, or appears to the public to have, substantial responsibility for or control over the conduct of government affairs. *See Stewart v. Sun Sentinel Co.*, 695 So. 2d at 361. Courts across the country consistently construe the test for public officials broadly encompassing almost every imaginable public employee, and certainly those that have any managerial or supervisory duties. *See Stewart* (finding correction officers to be public officials); *Ferguson v. Union City Daily Messenger, Inc.*, 845 S.W.2d 162, 166-67 (Tenn. 1992) (county employee with title Director of Finance held to be public official); *Moorhead v. Millin*, 542 F. Supp. 614, 618 (D. Virgin Islands 1982) (Director of Division of Utilities and Sanitation held to be public official); *Baumback v. American Broadcasting Cos.*, 26 Med. L. Rptr. 2138, 2139-42 (4th Cir. 1998) (federal bureaucrat with title Timber Sale Contract and Appraisal Specialist held to be public official); *Brown v. Kitterman*, 443 S.W.2d 146, 155 (Mo. 1969) (community center manager is public official); *Kinney v. Bauch*, 596 P.2d 1074, 1079 (Wash. App. Ct. 1979) (city clerk is public official); *Clawson v. Longview Publishing Company*, 589 P.2d 1223 (Wash. 1979) (administrator of county motor pool was a public official).

Smith described herself within the Complaint as a supervisor, the Director of the Finance Office, and the person responsible for the Finance Office. Thus, Smith by her own admission falls within the definition of a public official under Florida law.[5] As a public official, Smith would have to prove

5. It is worth noting that Smith's claim to be a private individual contradicts her claim that people throughout the state government immediately recognized the Column as being about her. Smith cannot have it both ways. She cannot be a lowly state employee on the one hand, and a well known state manager on the other.

actual malice on the part of the Democrat by clear and convincing evidence to prevail on her libel claim. The trial court correctly held that Smith cannot prove that the Democrat published the Column with knowledge of its falsity, or with reckless disregard of whether it was false. As the Column accurately reports the allegations made by Kranert in his lawsuit,[6] the trial court was correct in ruling that Smith cannot prove the Column is false, much less prove that the Democrat published the Column with reckless disregard to whether it was false or not. Smith's inability to ever plead the requisite degree of falsity or publication with reckless disregard of its falsity properly resulted in Smith's Complaint being dismissed with prejudice.[7]

D. The Column is protected by the Fair Reporting Privilege.

Under Florida law, there is a qualified privilege, the Fair Reporting Privilege, to publish reports concerning judicial proceedings. *See Huszar v. Gross*, 468 So. 2d 512, 516 (Fla. 1st DCA 1985) (affirming dismissal with prejudice on this basis). Courts routinely use motions to dismiss to decide whether this privilege applies to allegedly defamatory statements. *See id.* This privilege requires the report to be

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6. As noted earlier, the complaint in Kranert's lawsuit was one of the numerous attachments to Smith's Complaint. Thus, it was before the trial court when ruling on the Democrat's Motion to Dismiss.

7. Smith complains about the newspaper's failure to contact her about the Column. First, there would be no reason to do so since the Column was not about her. Second, as a matter of law, failure to investigate does not demonstrate actual malice. *See St. Amant v. Thompson*, 390 U.S. 727, 733 (1968).

fair and accurate, but not that it be "exact in every immaterial detail or that it conform to the precision demanded in technical or scientific reporting." *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 503 (Fla. 3d DCA 1993) (quoting the Restatement (Second) of Torts § 611, cmt. f). This privilege applies even if the official documents relied upon contain erroneous information. *See id.* at 502.

As stated above, the Column expressly states that it is based upon Kranert's lawsuit; a lawsuit that involves a state agency, and several high ranking state officials. For example, the second paragraph of the Column concludes by stating that Kranert is suing the DCF, while the third paragraph indicates the Column is based upon this lawsuit. It states, "Even in the stilted language of the law, his experience reads like a Gothic horror story." The tenth paragraph of the Column again expressly references "his lawsuit". Finally, Mr. Bob Williams is quoted as saying, "it's not appropriate to try litigation in the paper." A reasonable reader of the Column would clearly conclude that the Column is based upon Kranert's allegations in his lawsuit, not an independent investigation of the circumstances underlying Kranert's lawsuit.

This Column concerns a matter of public concern and is therefore a classic example of what the fair reporting privilege is meant to protect. The Column does not purport to detail and report on the underlying allegations, but rather only seeks to report on the lawsuit and its allegations.[8] Thus, as the

8. The Column correctly and accurately describes Kranert's allegations of retaliation in regard to his demotion and termination following his filing a grievance. This is the gist of the Column, as well as Kranert's lawsuit – state employees may be subject to demotion or dismissal for complaining.

Column is substantially accurate and has not exceeded the qualified privilege, the trial court properly dismissed the Complaint against the Democrat.

III. DISMISSAL WITH PREJUDICE WAS APPROPRIATE IN THIS CASE.

Florida law holds that pretrial dispositions of libel actions are "especially appropriate" because of the chilling effect these cases have on freedom of speech and freedom of press. *Stewart v. Sun Sentinel Co.*, 695 So. 2d 360, 363 (Fla. 6th DCA 1997) (affirming dismissals and summary judgments against the plaintiff); *From v. Tallahassee Democrat*, 400 So. 2d 52, 58 (Fla. 1st DCA 1981) (affirming dismissal with prejudice); *Hauser v. Urchisin*, 231 So. 2d 6, 8 (Fla. 1970) (reversing appellate court and reinstating dismissal with prejudice). "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment cannot survive." *New York Times v. Sullivan*, 376 U.S. 254, 278 (1964). Our democratic form of government requires a free press so that debate on public issues can be "uninhibited, robust and wide-open." *Id.* at 270.

The trial court properly recognized that Smith's Complaint against the Democrat was completely devoid of merit. As such, it was properly dismissed with prejudice under Florida law. To force the Democrat to incur the substantial expense of responding to fruitless attempts at amendment by Smith could potentially deter future columns for fear of these type of suits. This is clearly contrary to the spirit of both the United States and Florida Constitutions, as recognized in numerous cases from both the United States

and Florida Supreme Courts. *See New York Times v. Sullivan*; *Hauser v. Urchisin*. Thus, dismissal with prejudice was both proper and appropriate in this case.

IV. THE REMAINING COUNTS AGAINST THE DEMOCRAT WERE PROPERLY DISMISSED.

Smith's Count III against the Democrat alleging conspiracy to libel was also properly dismissed. There can be no conspiracy to libel when there has been no libel. *See Wright v. Yurko*, 446 So. 2d 1162, 1164-65 (Fla. 5th DCA 1984). Thus, as described above, Smith's failure to be able to state a cause of action for libel against the Democrat was fatal to her stating a valid cause of action for conspiracy to libel.

In order for a plaintiff to state a valid cause of action for intentional infliction of emotional distress, the plaintiff must allege and prove extreme and outrageous conduct. *See Clemente v. Horne*, 707 So. 2d 865, 867 (Fla. 3d DCA 1998). This alleged conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (quoting Restatement (Second) of Torts § 46 cmt. d). Under Florida law, it is the duty of the trial court "to determine in the first instance, whether the Defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Paul v. Humana Medical Plan, Inc.*, 682 So. 2d 1119, 1222 (Fla. 4th DCA 1996). This is properly tested on a motion to dismiss. *See id.*

Smith's Complaint failed to allege conduct on the part of the Democrat that even remotely approached this level.

The publishing of a Column which reports allegations of a lawsuit, but which never mentions her by name or position, cannot be considered as beyond all possible bounds of decency, atrocious, or utterly intolerable. To even suggest an intentional infliction of emotional distress claim exists again demonstrates Smith's tendency to exaggerate in order to attempt to manufacture a cause of action.

Further, the Florida Supreme Court has expressly stated, "a plaintiff cannot transform a defamation action into a claim for intentional infliction of emotional distress simply by characterizing the alleged defamatory statements as outrageous." *Fridovich v. Fridovich*, 598 So. 2d 65, 70 (Fla. 1992). A valid cause of action for intentional infliction of emotional distress requires an independent tort based upon independent facts. *See Ford v. Rowland*, 562 So. 2d 731, 735 (Fla. 5th DCA 1990).

Smith did not allege independent facts nor an independent tort to support her claim for intentional infliction of emotional distress, nor can she. Instead, Smith impermissibly characterized the publication of allegedly libelous statements as extreme and thus sought to support her claim. Smith's claim against the Democrat was grounded in libel. There are no allegations or facts to support any other cause of action. Thus, the trial court properly dismissed Count 5 of Smith's Complaint.

CONCLUSION

Please read the Column. It libels no one; and certainly not someone that was not even identified or described. For freedom of the press to have the meaning intended by the framers of the Constitution, meritless lawsuits that can, and in fact do, have a chilling effect, must be promptly rejected by the courts. The trial and appellate courts below properly did so. This case has already consumed far too many resources and far too much time. There are much worthier cases and issues for this Court to consider. For the reasons set forth herein, Tallahassee Democrat and Bill Cotterell respectfully request that this Court deny Smith's Petition for Writ of Certiorari.

Respectfully submitted,

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